89- 1428

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD E. SCHWARTZ,
Petitioner,

vs.

THE HONORABLE WILLIAM L. HUNGATE,
United States District Judge for the
Eastern District of Missouri,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In a hotly contested case under the Federal Voting Rights Act, the Honorable William L. Hungate, U.S. District Judge, *sua sponte* ordered petitioner Richard E. Schwartz, Esq., then counsel for the plaintiff in the underlying case, to show cause why sanctions should not be imposed upon him pursuant to Rule 11 of the Federal Rules of Civil Procedure. The defendants in the Voting Rights case, *Roberts v. Wamser, et al.*, declined the invitation of the District Court to participate in the Rule 11 proceedings. No delay nor damage to any party was shown. After a hearing the District Court imposed a $1,000.00 sanction on petitioner pursuant to Rule 11 for his alleged failure to conduct a "reasonable" inquiry into whether a volunteer lawyer, one Errol Mosley (now deceased), was a licensed attorney in California before signing the Clerk's Memo entering Mosley's appearance as co-counsel for Mr. Roberts. The District Court imposed sanctions despite its specific finding that petitioner possessed no improper purpose in filing the entry of appearance and despite the fact that petitioner voluntarily withdrew the entry of appearance immediately, just one week after it was filed, upon learning that Mosley was not a licensed attorney.

The Eighth Circuit affirmed, holding that a district court's ruling on the question whether Rule 11 was violated deserved "substantial deference" from the reviewing court. The questions thereby arising are:

1. Should a *de novo* standard of appellate review apply to the district court's finding that petitioner's conduct violated Rule 11?

2. May sanctions be imposed under Rule 11 when it is specifically found that the signing attorney did not possess any improper purpose in filing the paper?

a) If so, may a district judge properly impose three distinct sanctions?

3. May a district judge properly impose sanctions under Rule 11 against a signing attorney *sua sponte* after the signing attorney voluntarily withdraws a non-contested routine paper which has not caused any delay in the proceedings nor increased the litigation expenses of any party?

LIST OF ALL PARTIES

1. The Honorable William L. Hungate;
2. Jerry Wamser;
3. Rita Krapf;
4. Walter Wrenn, Jr.;
5. David Robbins; and
6. Michael Roberts.

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No.

IN THE

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OCTOBER TERM, 1989

MICHAEL ROBERTS,

VS.

JERRY WAMSER, *et al.*

In Re: Rule 11 Proceeding
Against Richard E. Schwartz, Esq.,
Petitioner,

And

THE HONORABLE WILLIAM L. HUNGATE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Richard E. Schwartz, Esq., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on August 30, 1989. The Petition for Rehearing by the panel and Rehearing en banc by the Eighth Circuit was denied on October 12, 1989.

OPINIONS BELOW

The Order of the Eighth Circuit denying the petition for rehearing en banc and by the reviewing panel appears at Appen-

dix A., *infra*. The opinion of the Eighth Circuit, as yet unreported, appears at Appendix B, *infra*. The Order and Opinion of the United States District Court for the Eastern District of Missouri appears at Appendix C, *infra*. The Eighth Circuit affirmed the judgment of the United States District Court for the Eastern District of Missouri *per curiam*.

JURISDICTION

The judgment of the Eighth Circuit was entered on August 30, 1989; and the Petition for Rehearing by the Panel or Rehearing en banc was denied by the Eighth Circuit on October 12, 1989. This Petition for certiorari was submitted no later than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. % 1254(1).

RULES PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Civil Procedure reads in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order

to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and thus are introduced to the Court in a summary fashion. This Rule 11 case arises out of an innocuous factual mistake made by petitioner, Richard E. Schwartz, Esq., a member of the bar of this Honorable Court, in a Clerk's Memo for the entry of a volunteer co-counsel in complex Voting Rights Act litigation. Petitioner seeks certiorari from the Eighth Circuit's perfunctory affirmance of the district court's Order dated September 29, 1988, finding that he violated Rule 11 of the Federal Rules of Civil Procedure and imposing a sanction in the amount of $1,000.00.

The district court's finding was based upon Mr. Schwartz having filed a Clerk's Memo showing an entry of appearance by one Errol Mosley, since deceased, as co-counsel for plaintiff Michael Roberts in the underlying Voting Rights Act case. One week after petitioner filed the Clerk's Memo he learned that Mr. Mosley, while a highly qualified law school graduate and former law clerk to a district judge in Los Angeles, had not passed the California Bar exam. Immediately petitioner filed a second Clerk's Memo withdrawing the entry of appearance.

The district court found that Mr. Schwartz failed to conduct a "reasonable inquiry" to determine whether Mr. Mosley was, in fact, licensed to practice law in the state of California before filing the Clerk's Memo for the entry of appearance. The district court also specifically found that the application for entry of appearance was not submitted by petitioner for any improper purpose, but rather was filed to retain additional counsel to aid him in the demands of the litigation.

On February 27, 1987, plaintiff in the underlying case Michael E. Roberts (Roberts hereinafter), filed a *pro se* complaint in the Eastern District of Missouri, arising out of his race in the Democratic primary election for President of the Board of Aldermen for the City of St. Louis. Thereafter on the morning of the primary election day, March 3, 1987, Roberts retained an unrelated attorney and sought a temporary restraining order that afternoon to halt the primary election until his lawsuit under the Voting Rights Act could be resolved. Roberts is black, and defendants below quickly certified him as the loser by 170-odd votes amid many suspicious circumstances, including their failure to count over 2,000 votes from predominantly black neighborhoods of the City.

On March 4, 1987 Roberts approached petitioner to seek his representation in the lawsuit. Petitioner expressed reservation about doing so because of the posture of the case — a *pro se* filing, the just-completed election, and Judge Hungate's displeasure with the failed proceeding on Election Day. Roberts, however, assured petitioner that he would have help in the case. Pursuant to those assurances, Mr. Schwartz was introduced to Errol Mosley by either his client or Roberts' wife as an attorney and relative of Mr. Roberts who could help with the lawsuit as a volunteer.

On March 5, 1987, petitioner Schwartz entered his appearance as counsel for Roberts and took immediate action to reorganize the Voting Rights litigation. District Judge Hungate required the filing of a brief on the applicability of the Voting Rights Act by the next day, and Mr. Schwartz was ordered to respond to dozens of interrogatories and document production requests by the following Monday, March 9, 1987.

During the ensuing month, from March 5 to April 8, 1987 (the date of the application for Errol Mosley's entry of appearance), Mr. Schwartz filed three amended complaints on behalf of Roberts, and filed and received numerous discovery requests and notices to comply with District Judge Hungate's

discovery deadline of April 13, 1987. In this interval he also sought an extraordinary writ in the Eighth Circuit to compel Judge Hungate to act on a number of motions he refused to rule.

Petitioner also sought and obtained a partial manual recount of ballots in the primary election — an integral part of the case which directly lead to the district court's eventual finding of a violation of the Voting Rights Act. During the initial month of representation Mr. Schwartz also obtained an Order from Judge Hungate to seize the ballots from defendants and to impound and seal the ballots from the Democratic primary election.

On the first day after the general election the district judge ordered a manual recount for one-fourth of the City's wards, pursuant to a Motion prepared and filed by petitioner. Later Mr. Schwartz successfully moved for a full manual recount of the remaining wards. These recounts substantiated that defendants had failed to count the equivalent of nearly one full ward of ballots.

During the one-month period after Mr. Schwartz entered his appearance, Mr Mosley as a volunteer lawyer performed numerous research and drafting assignments under the direction of Mr. Schwartz in connection with many aspects of the Voting Rights Act case. In every instance his work product was of the highest caliber. During that time Mr. Mosley told Mr. Schwartz that he had previously clerked for a federal district court judge in Los Angeles and was an associate "on sabbatical" at the law firm of O'Melveny & Myers in Los Angeles.

On March 13, 1987, in a hearing before District Judge Hungate, Mosley stood in open court, orally represented to the judge that he was an attorney for Roberts, and stated that he wanted to enter his appearance in the case. Judge Hungate then told Mr. Mosley to do so at a later time. The occasion for that hearing is telling as to the abusive nature of the sanctions imposed on petitioner. Respondent there permitted counsel for the

Election Board — defendants in the underlying litigation — to repudiate a key paper they had signed and filed with the district court, a stipulation for a full manual recount of the primary election.

In the intermim before petitioner signed the entry of Mosley's appearance in the case, the two had numerous discussions relating to Mr. Mosley's background in which Mosley told petitioner that he was "on a sabbatical" from the O'Melveny and Myers law firm in Los Angeles, and was able to devote his full energies to his cousin's lawsuit.

On April 8, 1987, while en route from St. Louis to a conference in the district judge's chambers in Hannibal, Missouri on the Voting Rights case, Mr. Schwartz requested Mr. Mosley's assistance in taking depositions in this litigation. Because of the accelerated discovery schedule in this matter, Mr. Schwartz impressed upon Mr. Mosley the need to associate additional counsel to take depositions. Mr. Mosley did not at any point state that he would be unable to handle the depositions. Upon arrival at the federal courthouse in Hannibal, petitioner prepared a handwritten memo to associate Mr. Mosley as his co-counsel, after Mr. Mosley agreed that it was a good time to enter his appearance. Before the conference in chambers, Mr. Schwartz requested Mr. Mosley to review the memorandum for verification, and Mr. Mosley affirmatively stated that every point of the Application was true and correct. During the conference, Mr. Schwartz submitted the handwritten application to Judge Hungate who granted it.

On April 14, 1987, petitioner Schwartz received a telephone call from his client Roberts, who informed him that it was necessary to withdraw the appearance of Mr. Mosley as an attorney of record. Mr. Roberts then finally informed Schwartz that Mr. Mosley had taken, but not passed, the California Bar Exam. Mr. Schwartz promptly prepared and signed another Clerk's Memo withdrawing the appearance of Mr. Mosley as co-counsel in this case; it was filed the following day.

During the week he was shown as co-counsel in this matter, Mr. Mosley signed no pleadings, attended no hearings, took no depositions and performed no duties other than those of a law clerk. The only judicial appearance of Mr. Mosley in the case was the chambers conference he attended in Hannibal for some minutes with Mr. Schwartz.

The entry caused no delays in the litigation. Nor did any party incur the slightest unreasonable or unnecessary expense as a result of Mr. Mosley's short appearance in the litigation. In fact, no party incurred any expense at all as a result of his appearance. This is evidenced by the decision of all defendants in the underlying case not to involve themselves in the Rule 11 proceeding.

On May 21, 1987, over one month after petitioner withdrew the entry of appearance, the district court *sua sponte* initiated the Rule 11 proceeding. On June 4, 1987, Donald Wolff, General Counsel of the ACLU in Eastern Missouri, entered his appearance as counsel for plaintiff Roberts. On June 10, 1987, Mr. Schwartz sought leave to withdraw from the case during an "informal matters" docket before the district court. In a crowded open court, Judge Hungate proceeded to chastise Mr. Schwartz severely for his entry of appearance for Mr. Mosley. Petitioner submits that public excoriation alone was an excessive sanction for his innocuous mistake.

On February 19, 1988, Judge Hungate held a hearing on the imposition of sanctions. Mr. Wolff appeared as a courtesy to the Court and Mr. Schwartz was represented by the undersigned counsel. The defendants in the underlying case did not appear and expressly disclaimed any interest in the imposition of sanctions. On September 29, 1988, the district court filed its Order and Memorandum imposing a $1,000.00 sanction against Mr. Schwartz for allegedly violating Rule 11. As a third sanction the district court announced that consideration of petitioner's fee request would be withheld until he paid the monetary sanction. *See* Appendix C. Mr. Schwartz promptly filed an appeal with the Eighth Circuit.

In a one-page *per curiam* decision, the Eighth Circuit summarily affirmed the ruling of the district court. *See* Appendix B. The Eighth Circuit held that the district court's determination whether a violation of Rule 11 occurred deserved "substantial deference from a reviewing court." On Motion for Rehearing in the Eighth Circuit, petitioner contended that the *per curiam* panel erroneously failed to follow the *de novo* standard of review on the question whether the conduct involved violated Rule 11. But the Eighth Circuit cursorily denied the Motion for Rehearing. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

1. The decision below of the Eighth Circuit conflicts with decisions in other federal judicial applying a *de novo* standard of review to a district court's determination that the conduct in question violated Rule 11 of the Federal Rules of Civil Procedure.

Petitioner submits that his case presents an apt decisional companion to *Cooter & Gell v. Hartmarx,* 875 F.2d 890 (D.C. Cir. 1989), *cert. granted,* 110 S.Ct. 275, 58 U.S.L.W. 3252 (1989). In *Cooter & Gell* this Court granted certiorari on the question of what is the appropriate level of appellate review of a finding that the signing attorney's conduct violated Rule 11 of the Federal Rules of Civil Procedure (FRCP). Specifically, the question presented in *Cooter & Gell* is whether the "abuse of discretion" standard of review is appropriate. 58 U.S.L.W. at 3252-53.

Here the Eight Circuit applied a "substantial deference" reviewing standard to the district court's finding that petitioner's conduct violated Rule 11. *See* Appendix B at 2. The standard of appellate review applied by the Eight Circuit conflicts with the *de novo* standard applied by the Ninth Circuit, *see Zalvidar v. City of Los Angeles,* 780 F.2d 823, 828 (1986), and the Seventh Circuit, *see Medical Emergency Service Associates v. Foulke,* 844 F.2d 391, 399 (1988). The Fifth Circuit, adopting an "abuse of discretion" standard of appellate review identified the "divergence of opinion among the circuits as to the proper standard of review to be applied to Rule 11 decisions by district courts." *Thomas v. Capital Security Services, Inc.,* 836 F.2d 866, 872 (1988) (en banc).

In a prior case the Eighth Circuit accepted that a *de novo* review standard applied to the district court's determination that the conduct at issue violated Rule 11. *See Hartman v. Hallmark Cards, Inc.,* 833 F.2d 117, 124 (1987). Here it gave no explanation for, nor apparent attention to this shift in the stan-

dard of review. This conflict in the circuits as to the appropriate review standard demands that the Court grant certiorari to resolve the obvious problems it creates. These problems include varying review standards which impose inconsistent obligations upon attorneys who practice in more than one judicial circuit and sow unpredictability and uncertainty.

In the event this Court should hold in *Cooter & Gell* that a *de novo* standard of review applies, then petitioner respectfully requests that his petition for certiorari be granted, the judgment of the Eighth Circuit be vacated and the cause remanded for further proceedings in consonance with *Cooter & Gell v. Hartmarx.*

It has been well-documented in scholarly articles and judicial opinions that Rule 11 is a potent tool in the hands of district judges and has been prone to abuse. Thus, some courts have attempted to limit the Rule's applicability to "exceptional circumstances" of egregious or abusive proceedings by the signing attorney and have held that a Rule 11 sanction is not warranted every time a lawyer files a mistaken pleading or paper. *See Gaiardo v. Ethyl Corp.,* 835 F.2d 479, 483 (3d Cir. 1987); *Baranski v. Serhant,* 106 F.R.D. 247, 249-50 (N.D.Ill. 1985). *See also* Schwarzer, *Rule 11 Revisited,* 101 Harv. L. Rev. 1013, 1017 (1988) (noting that the cases imposing Rule 11 sanctions punish only "egregious" conduct). *De novo* appellate review would help curtail abusive use of Rule 11 to chill advocacy.

If the proper standard of review had been applied in this case, the Eighth Circuit almost certainly would have found that petitioner did not violate Rule 11. By the panel's *per curiam* decision it is evident respondent's conclusion that petitioner violated Rule 11 was given every conceivable deference. It is clear that the facts and law were not seriously reviewed in any fashion.

A *de novo* review of the facts would reveal that petitioner made a completely reasonable inquiry into the basis of the Entry of Appearance Clerk's Memo. It also would reveal that respondent applied the most exacting scrutiny to petitioner's conduct

while indulging his opponents as they engaged in blatant bad faith. One of the most critical issues in the Voting Rights case was obtaining a full manual recount of the computerized ballot cards. Yet respondent permitted the Election Board defendants to announce publicly that they would capitulate to this demand by Mr. Roberts, to enter into a signed and filed agreement on the record to do that, and then to change course the next day at the behest of the white "winner" and refuse to abide by their agreement. Respondent accommodated their switch of direction by changing what their counsel signed as a memorandum order into a "Proposed Order." The potential for arbitrariness, if not partiality in the application of Rule 11 under the "substantial deference" standard of review could scarely be better exemplified.

When one considers the District Court's onerous discovery and pleading deadlines in the underlying Voting Rights Act case and petitioner's prior reliance upon the volunteer lawyer, his conduct was eminently reasonable although unfortunately mistaken. Petitioner was told by his clients and by the volunteer lawyer that Mosley was a licensed attorney. Furthermore, Mosley had earlier represented in open court to Judge Hungate that he was a licensed attorney.

Under the facts and circumstances of the Voting Rights litigation, requiring extensive daily action on the part of petitioner Schwartz, he obviously performed the requisite "reasonable inquiry" under Rule 11 into whether Errol Mosley was a licensed attorney. He had no way to know that his volunteer lawyer-helper was terminally ill, and thus heedless of the consequences of his actions. If the Eighth Circuit had applied the *de novo* standard instead of the "substantial deference" standard of review, clearly and necessarily it would have reversed the District Court's ruling. Accordingly, petitioner requests that the Court grant his petition for a writ of certiorari on the first question.

2. The decision of the Eighth Circuit conflicts with the principles underlying Rule 11 as it affirms the district court's ruling that sanctions could be imposed when it had been found specifically that the petitioner did not possess an "improper purpose" in filing the paper.

Petitioner submits that this Court should grant certiorari to address an extremely important question about the scope and coverage of Rule 11. Namely, may a violation be found and sanctions imposed when the district court specifies that no "improper purpose" motivated the paper? The issue goes directly to the structure of Rule 11's language. Read carefully, the language of Rule 11 prevents a court from imposing sanctions where the signing attorney has no "improper purpose" in filing the pleading or other paper.

As a beginning note, this Court recently held that the Federal Rules of Civil Procedure, including Rule 11, are to be given "their plain meaning. . .". *Pavelic & Leflore v. Marvel Entertainment Group,* No. 88-791, ____ U.S. ____, 58 U.S.L.W. 4038 (1989) It is important to look both to the language of the rule and its punctuation to determine the requirements thereof. Rule 11 provides that "[t]he signature of an attorney . . . constitutes a certificate by the signer. . ." to two separate items. First, the signer certifies that he/she has read the pleading or other paper. Second, the signer certifies that the pleading or paper "to the best of the signer's knowledge, information, and belief formed after *reasonable inquiry* . . . is *well grounded in fact . . ., and* that it is not interposed for any *improper purpose.* . . ." Fed. R. Civl. P. 11 (emphasis added).

The key word in rule 11 for these purposes is the "and" between the "well grounded in fact" and the "improper purpose" phrases. Petitioner submits that the inclusion of the word "and" between these phrases conclusively indicates that a pleading or paper must be not well grounded in fact and filed for an improper purpose before a Rule 11 violation can exist.

Clearly, had the framers of Rule 11 intended otherwise they would have used the word "or" instead of "and."

In passing this Court stated that Rule 11 "requires pleadings to be based on a *good-faith belief,* found after reasonable inquiry, that they are well grounded in fact. . . ." *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 108 S.Ct. 376, 385 (1987) (emphasis added).

Other cases have held that Rule 11 sanctions cannot be awarded where the court does not find an improper purpose for the filing. In the case of *In re Itel Securities Litigation,* 791 F.2d 672, 675 (9th Cir. 1986), *cert. denied,* 479 U.S. 1033 (1987), the court held that sanctions may be imposed by the district court on its own initiative under Rule 11 only if there is a finding that the attorney signed the paper in "bad faith." *See also Greenfield v. District of Columbia,* 623 F.Supp. 47, 50 (D.D.C. 1985) (holding that "sanctions are appropriate, however, only where the offending party has acted at least in bad faith"); *Leroux v. Lomas & Nettleton Co.,* 626 F.Supp. 962, 969 (D.Mass. 1986) (holding that Rule 11 was not violated even though the pleading was factually erroneous, where there was no evidence of "sham or false" allegations therein). *Contra Eastway Cost. Corp. v. City of New York,* 762 F.2d 243, 253-54 (2d Cir. 1985) (cited by the district court herein).

Certainly many, if not most cases involving an "unreasonable inquiry" into the facts supporting the filing will also merit a finding of objective bad faith — e.g., that the paper or pleading was interposed to harass the opponent or delay the litigation. It is, however, quite plausible for a situation such as this one to arise. That is, the filing of an uncontested paper occurs but it contains an inadvertent and innocuous mistake which is quickly corrected and does not delay the proceedings or otherwise harm the opposition. Should a district judge be free to seize on an innocent mistake as a pretext for harsh sanctions without full appellate review? In short, a filing not motivated by an improper purpose, petitioner submits, should not support the potentially

enormous harm to counsel and their clients which Rule 11 can pose. Here, for example, substantial negative publicity resounded to both petitioner and his client, a serious politician, by reason of the hyper-charged media scrutiny of the Voting Rights suit.

In a case where the paper was not interposed for any improper purpose, it would violate the intent of Rule 11 to impose a sanction. *See Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986) (holding "the purpose of the amendments [to Rule 11] was to 'reduce frivolous claims, defenses or motions' and to deter 'costly, meritless maneuvers' "). Thus, it is beyond cavil that Rule 11 does not compel a court to sanction every mistake in a pleading or paper. *See, e.g., Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470, 472 n.2 (N.D. Ill. 1987) (holding that facts of the case did not justify sanctions even though the attorney was in error). *Accord Zambrano v. City of Tustin*, 885 F.2d 1473, 1478-80 (9th Cir. 1989) (holding that a court may not impose sanctions for violations of local rules where there is no finding of bad faith and this error was not due to anything more than an oversight or ordinary negligence). None of the Rule 11 cases found by petitioner, except this one, permit the application of sanctions for a minor factual mistake which causes no delay or expense and is voluntarily remedied.

Here the district court specifically found that petitioner Schwartz did not sign the entry of appearance for any improper purpose. Under the language of Rule 11 and the better-reasoned caselaw, that finding of fact precluded the imposition of any sanction, and certainly the further sanctions of a monetary "fine" and fee request postponement over and above the open-court reprimand of Mr. Schwartz. The Court must grant certiorari here to define the prerequisites to holding that attorney conduct violates Rule 11 and to resolve the conflict in the caselaw.

3. The decisions of the lower courts fail to consider petitioner's factual arguments whether Rule 11 sanctions can be imposed, as a matter of law, when prompt remedial action is undertaken before the sanctions issue is raised, and before any party bore any expense or the proceedings were delayed.

This case presents an issue nearly identical to one of the questions presented in *Cooter & Gell, supra,* namely whether the district courts have jurisdiction to impose Rule 11 sanctions if the issue is raised *after* the paper in question has been voluntarily withdrawn by the signing attorney. *See Cooter & Gell, supra,* 58 U.S.L.W. at 3252-53. In *Cooter & Gell,* one of the questions which the Court will consider is whether sanctions may be imposed under Rule 11 after the entire cause is voluntarily dismissed by the plaintiff. *Id.* In the present case, one key question is whether the district court may impose Rule 11 sanctions *sua sponte* after the signing attorney voluntarily withdraws a non-litigated Clerk's Memo that was mistakenly or negligently filed when such did not cause any delay in the proceedings nor did it increase the litigation expenses of the parties.

In this respect also this Petition provides a helpful comparison and companion to *Cooter & Gell v. Hartmarx,* 110 S.Ct. 275 (1989). Certiorari should be granted here for the purpose of consolidating this case with *Cooter & Gell* for a unified disposition.

This case, however, presents an even more compelling vehicle by which the Court may consider the jurisdictional issue. Here, as noted, petitioner was the sole attorney for a Voting Rights Act plaintiff in litigation having a potentially profound effect on politics in the City of St. Louis.

As acknowledged by the district court in its memorandum opinion (Appendix C), the Voting Rights Act litigation was fast-moving and complex. When the district court's stringent deadlines for discovery and the filing of pleadings became more

onerous petitioner sought help in the litigation. Petitioner's clients recommended that he utilize a lawyer cousin, Mr. Mosley. Both Mr. Mosley and the Roberts family represented to petitioner that Mosley was a licensed attorney. After observing his work as a law clerk in the litigation, petitioner asked Mosley if he would enter his appearance as co-counsel for plaintiff Roberts. Mosley agreed and the Clerk's Memo was signed by District Judge Hungate granting Mosley leave to enter his appearance. One week later petitioner finally uncovered that his volunteer was not in fact a licensed attorney. Immediately petitioner prepared a withdrawal of the entry of appearance which was filed in court the next day.

This prompt remedial action by petitioner avoided any possible delay in the proceedings or expense to the parties, since during Mosley's short period in the case he signed no pleadings, took no depositions, and never appeared alone in court. Thus, none of the purposes of Rule 11 — to compensate the wronged party and to deter frivolous litigation and abusive practices, *see Medical Emergency Service Associates v. Foulke,* 844 F.2d 391, 400 (7th Cir. 1988) — could be served by finding a violation in these circumstances. Petitioner submits that Rule 11 cannot be violated and the district court does not have the power, *sua sponte,* to impose Rule 11 sanctions when an attorney mistakenly signs a non-contested court memorandum which he voluntarily withdraws within one week of filing before it can cause any delay or expense to the parties.

In *Johnson Chemical Co., Inc. v. Home Care Products,* 823 F.2d 28, 31 (2d Cir. 1987), the appeals court held that a district court could not impose Rule 11 sanctions after the plaintiff voluntarily dismissed the entire action. Petitioner contends that the same principle applies here. That is, once the signing attorney withdraws the allegedly offending paper before the district court, *sua sponte,* and before an opponent raises the issue of Rule 11 sanctions, the district court loses the power to impose sanctions.

Petitioner's contention, along with the Second Circuit's ruling in *Johnson Chemical Co., supra,* is in direct conflict with *Danik, Inc. v. Hartmarx Corp.,* 875 F.2d 890, 895 (D.C. Cir. 1989), *cert. granted,* 110 S.Ct. 275 (1989). Certiorari should be granted for this case to provide the Court with a broader factual basis to resolve the conflict between the circuits on the question whether the district courts have the power to impose sanctions after a paper has been voluntarily withdrawn. Alternatively, in the event that this court reverses the holding of the District of Columbia Circuit in *Danik, Inc. v. Hartmarx Corp., supra,* petitioner respectfully requests that this Honorable Court grant his petition for writ of certiorari, vacate the judgment of the Eighth Circuit, and remand the case to the Eighth Circuit for further proceedings.

CONCLUSION

This petition presents yet another instance where Rule 11 sanctions have been misused to attack counsel for a controversial party or cause. The record below demonstrates that the Respondent seized with vengeance on an innocuous, innocent mistake of counsel for a civil rights plaintiff after Respondent had indulged opposing counsel in a bad-faith filing and, in fact assisted them in repudiating an agreed, written, and filed settlement of a key issue. By contrast, Petitioner's conduct drew three sanctions from Respondent.

Only one of those sanctions is presently before this Court — the monetary "fine" imposed *sua sponte* when opposing counsel declined to participate in Respondent's proceeding. Two of the sanctions were imposed in such fashion as to put them beyond review.

This makes it even more imperative that certiorari be granted to limit the potential for arbitrary abuse of Rule 11. Petitioner's factual mistake caused no harm, delay or needless expense to any party. He rectified that mistake promptly and voluntarily before Respondent initiated the Rule 11 proceeding. Even Respondent was forced to conclude after a hearing that Petitioner has no improper purpose in filing the paper. The Court of Appeals lamentably applied a "substantial deference" standard of review and failed to inquire.

This case exemplifies why the *de novo* standard is the only feasible standard of appellate review in Rule 11 sanctions. It would be an excellent decisional companion to the pending *Cooter & Gell v. Hartmarx* case. Two of the three major questions this petition presents for review are similar to issues presented for this Court's decision in *Cooter & Gell*. The third major question presented here - the imposition of sanctions without any improper purpose - is of general interest to the Bench and Bar; further it is an important question of federal law which has not been settled.

Granting certiorari here cannot undo the loss of political prestige dealt to Petitioner's client by the actions of Respondent in initiating and imposing sanctions. Nor can it erase Respondent's harsh public rebuke of Petitioner. It can, however, protect other advocates for unpopular or novel ideas from arbitrary abuse. This Court must grant certiorari to serve justice and to excise this dangerous precedent from the Rule 11 jurisprudence.

Respectfully submitted,

MARTIN, BAHN, MALEC
AND CERVANTES

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APPENDIX

Appendix A. Denial of Petition for Rehearing by Panel or En Banc by United States Court of Appeals for the Eighth Circuit dated October 12, 1989 in Cause NO. 88-2546EM. A-1

Appendix B. Per Curiam Opinion of the United States Court of Appeals for the Eighth Circuit dated August 23, 1989 in Cause NO. 88-2546. ..... A-2

Appendix C. Order and Memorandum of the Honorable William L. Hungate, United States District Judge, Eastern District of Missouri, dated September 28, 1988 in Cause No. 87-0347C(3)..... A-4

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2546EM

Michael V. Roberts,

vs.

Jerry Wamser, et al,

In Re: Rule 11 Proceeding against Richard E. Schwartz,
Appellant.

Appeal from the United States District Court for the
Eastern District of Missouri.

The suggestion for rehearing en banc filed by appellant Richard E. Schwartz has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 12, 1989

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2546

Michael V. Roberts,

vs.

Jerry Wamser, et al,

In Re: Rule 11 Proceeding against Richard E. Schwartz,
Appellant.

Appeal from the United States District Court for the
Eastern District of Missouri.

Submitted: January 20, 1989

Filed: August 30, 1989

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Richard E. Schwartz, counsel for Michael V. Roberts in *Roberts v. Wamser,* 679 F.Supp. 1513 (E.D. Mo. 1987), *appeal docketed,* No. 88-1138 (8th Cir. Jan. 19, 1988) filed Errol Mosley's entry of appearance as co-counsel with the District Court. Mosley, however, was not a licensed attorney, and when this fact was discovered, Schwartz withdrew Mosley's appearance. The District Court held a hearing to determine whether a sanction against Schwartz was appropriate. The District Court found that Schwartz had violated Fed. R. Civ. P. 11 by failing to make a reasonable inquiry into Mosley's status

as a member of the bar. The District Court imposed a $1,000 sanction against Schwartz. *Roberts v. Wamser,* No. 87-0347C(3) (E.D. Mo. Sept. 29, 1988) (order and memorandum sanctioning Schwartz).

Schwartz appeals the sanction, contending that the District Court (1) erred in holding that the facts established a violation of Rule 11, and (2) abused its discretion in imposing a sanction of $1,000 when a reprimand would have been sufficient.

Whether a violation of Rule 11 has occurred involves a determination that "rests upon and is informed by the District Court's intimate familiarity with the case, parties, and counsel, a familiarity we cannot have. Such a determination deserves substantial deference from a reviewing court." *O'Connell v. Champion International Corp.,* 812 F.2d 393, 395 (8th Cir. 1987). Having carefully reviewed the record and Schwartz's arguments on appeal, we see no error of fact or law in the District Court's determination that a violation of Rule 11 occurred. Further, we cannot say that the District Court abused its discretion in fashioning the sanction. On the basis of the District Court's thorough and well-reasoned order and memorandum, the sanction imposed is AFFIRMED. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-0347C(3)

Michael Roberts,
Plaintiff,

vs.

Jerry Wamser, et al,
Defendants.

ORDER

(Filed: Sept. 29, 1988)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that, pursuant to Fed. R. Civ. P. 11, sanctions in the amount of $1,000.00 are imposed against and to be paid promptly by Richard E. Schwartz. This payment shall be made to the Clerk of the Court for deposit in and use as part of the "Attorney Admission Fee Non-Appropriated Fund." *See* Local Rules 2(R), 2(S), and 2(T).

Mr. Schwartz' application for an award of attorney's fees and expenses shall remain under consideration pending compliance with this order.

Dated this 29th day of September, 1988.

/s/ William L. Hungate,
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-0347C(3)

Michael Roberts,
Plaintiff,

vs.

Jerry Wamser, et al,
Defendants.

MEMORANDUM

(Filed: Sept. 29, 1988)

This matter is before the Court to consider the imposition of sanctions against attorney Richard E. Schwartz pursuant to Fed. R. Civ. P. 11 for signing, filing of record, and obtaining a favorable ruling on a request that a nonlocal "attorney," who actually was not licensed by any state bar or by any court despite Mr. Schwartz' statements to the contrary, be admitted to appear as counsel on behalf of plaintiff Michael V. Roberts[1] in this case.

On March 5, 1987, Mr. Schwartz entered his appearance in this case as attorney on behalf of plaintiff Michael V. Roberts. On April 8, 1987, plaintiff Roberts filed a handwritten memorandum "application for leave to appear specially" (hereinafter referred to as "application"), which was signed by Mr. Schwartz only.[2] This application states in full:

---

[1] Since at the time of the relevant events Michael V. Roberts was not the only plaintiff nor the only Roberts plaintiff named in this litigation, the Court will refer to him as plaintiff Michael Roberts.

[2] Mysteriously, the Court file no longer contains the original of this memorandum application. The Court has placed of record a copy of its copy of the original memorandum.

Plaintiff Michael v. Roberts prays that Errol G. Mosley be granted leave to appear herein specially together with Richard E. Schwartz on behalf of said plaintiff. In support of this application your movant-plaintiff states as follows:

1. Errol G. Mosley graduated from Howard University in D.C. and thereafter served as law clerk to the Honorable Consuelo B. Marshall, United States District Judge for the Central District of California.

2. Errol G. Mosley is a member of the State Bar of California and is admitted to practice before the Supreme Court of California.

3. Errol G. Mosley also is admitted to practice before the U.S. Court of Appeals, Ninth Circuit, and the U.S. District Court for the Central District of California.

4. Errol G. Mosley is an associate with the firm O'Melveny and Meyers, Los Angeles, and is presently on sabbatical leave from that firm.

WHEREFORE plaintiff Roberts prays that Errol G. Mosley be admitted specially [several words illegible].

/s/ Richard E. Schwartz
Attorney for Plaintiff Roberts

On April 8, 1987, the Court granted Mr. Mosely [Mosley] leave to appear pro hoc vice and Mr. Mosely [Mosley] attended a chambers conference regarding this case, *see* order dated April 19, 1987.

On April 15, 1987, a "memorandum for clerk" signed only by Richard E. Schwartz, attorney for plaintiff Michael Roberts, was filed. That memorandum states in full:

Comes now Errol G. Mosely and withdraws his appearance herein as co-counsel for plaintiff Michael V.

Roberts. Richard E. Schwartz will continue as counsel on behalf of plaintiff Michael V. Roberts.

On April 20, 1987, the Court granted Mr. Mosely [Mosley] leave to withdraw.

Thereafter, the Court learned that Mr. Mosely is not a member of the State Bar of California, is not admitted to practice before the Supreme Court of California, is not admitted to practice before the United States Court of Appeals for the Ninth Circuit, and is not admitted to practice before the United States District Court for the Central District of California.

On May 21, 1987, the Court entered a show cause order directing Mr. Schwartz to demonstrate why sanctions under Fed. R. Civ. P. 11 should not be imposed against him. The order directed Mr. Schwartz to file a brief and any evidentiary materials to support his position on this matter. The order gave other parties the opportunity to file a brief and evidentiary materials in response to any materials submitted by Mr. Schwartz.

Characterizing the application as "mistaken," Mr. Schwartz urges the imposition of sanctions is improper because (a) under the circumstances (the "relatively stringent deadlines" in the case and his working relationship with Mr. Mosely), he made a reasonable inquiry into the facts set forth in the application, and (b) there was no improper purpose attending the filing of the application. Additionally, Mr. Schwartz urges the filing of the application did not cause any delay, substantial waste of judicial resources, or unnecessary additional expense. In support of his positions on this issue, Mr. Schwartz filed his own affidavit and the affidavit of Mr. Mosely.

By his affidavit, Mr. Schwartz states:

(a) on or about March 4, 1987, plaintiff Michael Roberts introduced Mr. Mosely to Mr. Schwartz as a relative of plaintiff Michael Roberts' wife and a person who would be available to

assist Mr. Schwartz in this litigation. Plaintiff Michael Roberts advised Mr. Schwartz that Mr. Mosely was a graduate of Howard University Law School and Mr. Schwartz "formed the impression at that time that Mr. Mosely was in fact a practicing attorney;"

(b) for approximately six weeks, Mr. Mosely performed for Mr. Schwartz research and drafting assignments regarding this litigation and such work was, to Mr. Schwartz, "of the highest caliber." "There was nothing in his work or demeanor to give [Mr. Schwartz] any suggestion that he was anything other than a duly licensed practicing attorney."

(c) during conversations with Mr. Mosely about the practice of law, Mr. Schwartz learned of Mr. Mosely's work on civil rights cases, as a law student clerk with a Washington D.C. law firm, and during his association with a Los Angeles, California, law firm. Mr. Schwartz "acquired the impression that [Mr. Mosely] was on an extended leave from [the latter] firm for personal purposes. In all these conversations Mr. Mosely showed himself [to Mr. Schwartz] to be an extremely well informed student of the law, one who possessed an exhaustive knowledge of civil rights laws."

(d) Mr. Schwartz "acquired the impression from [Mr. Mosely's statements] and from [their] conversations that [Mr. Mosely] was already a member of the California bar . . . admitted to practice before the Ninth Circuit and the U.S. District Court for the Central District of California."

(e) on the way to the courthouse for the April 8, 1987, chambers conference, Mr. Schwartz discussed with Mr. Mosely the need for assistance in conducting certain depositions. While Mr. Mosely reportedly was reluctant, "[h]e did not specifically state that he would not be able to handle any such deposition, nor did he give any indication that he might not be qualified to practice in this Court." Prior to the conference, Mr. Schwartz prepared the handwritten application and "verbally checked it with Mr. Mosely who voiced no dissent."

(f) within the next few days, Mr. Schwartz learned from plaintiff Michael Roberts that Mr. Mosely had taken but not passed the California bar examination. "Upon receipt of this information [Mr. Schwartz] prepared and signed the document withdrawing the appearance of Mr. Mosely as co-counsel for plaintiff [Michael Roberts]." Mr. Schwartz further avers (1) that during the week Mr. Mosely was co-counsel, he "signed no pleadings, attended no hearings, took no depositions and generally performed only the duties of a law clerk;" (2) other counsel were not prejudiced and incurred no unreasonable or unnecessary expense as a result of Mr. Mosely's appearance; and (3) the litigation had not been delayed due to Mr. Mosely's appearance." Mr. Schwartz attributes Mr. Mosely's "silence" to a "sense of personal failure or embarrassment at not having been successful in taking the California Bar Exam."

Mr. Mosely's affidavit in support of Mr. Schwartz' position on the show cause order states Mr. Mosely (1) graduated from Howard University School of Law in 1982; (2) while at law school he worked on civil rights matters and clerked for the Arnold & Porter law firm in Washington, D.C.; (3) after law school he was a law clerk for the Honorable Consuelo Marshall, United States District Judge for the Central District of California; (4) after his judicial clerkship and until March 1985, he worked for the O'Melveny & Meyers law firm in Los Angeles, California; and (5) between March 4, 1987, and mid-April 1987, he performed for Mr. Schwartz numerous drafting and research assignments related to this litigation.

Board defendants[3] responded to Mr. Schwartz' materials by noting the information on which Mr. Schwarz relied to submit the application was "merely his impression based upon his working relationship with Mr. [Mosely]" and shows Mr.

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[3] Those defendants referred to as "Board defendants" are: Jerry Wamser, Rita Krapf, Walter Wrenn, Jr., and David Robbins, all members of the Board of Election Commissioners for the City of St. Louis, Missouri.

Schwartz made no inquiry prior to signing and submitting the application. These defendants further point out that the affidavits submitted by Mr. Schwartz and Mr. Mosely do not disclose that Mr. Mosely is licensed to practice law. Moreover, personal embarrassment, these defendants urge, "falls far short under Rule 11's standards." An affidavit filed in support of Board defendants' materials avers that Mr. Mosely did appear in court with Mr. Schwartz regarding this case, including the April 8, 1987, chambers conference.[4]

Upon consideration of these materials, the Court denied without prejudice Mr. Schwartz' request to withdraw as counsel of record in this case, and scheduled a hearing on this matter. Orders dated August 26, 1987; September 11, 1987; October 23, 1987; November 20, 1987; December 17, 1987. Prior to the scheduled hearing on January 14, 1988, Mr. Schwartz' counsel advised the Court Mr. Schwartz would not appear due to the fact he had "lost his voice," and Board defendants' counsel advised the Court they would not appear because they had "no interest" in the proceeding.[5] *See* order dated January 15, 1988. In order to give Mr. Schwartz an opportunity to appear on the sanctions issue, the hearing was reset.

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[4] Part of this affidavit and other affidavits filed by Board defendants directed to conduct by Mr. Mosely in allegedly not being truthful with personnel of the St. Louis Board of Election Commissioners during a visit to its offices will not be considered by the Court in determining whether or not to impose sanctions on Mr. Schwartz pursuant to Rule 11. That conduct was not part and parcel of any signed pleading or other paper filed of record. *See* Fed. R. Civ. P. 11.

[5] The fact that the litigants are not interested in pursuing Rule 11 sanctions does not prevent the Court from pursuing them. Rule 11 allows the Court to consider "on its own initiative" a violation of the rule. *See* Advisory Committee Notes, 77 F.R.D. 165, 200 (authority of courts to impose sanctions on their own motion has been made explicit in Rule 11).

At the hearing on this matter, Mr. Schwartz reiterated the information contained in his affidavit. Mr. Schwartz also testified that an incident in open court on March 13, 1987, involving Mr. Mosely and the Court gave further support to Mr. Schwartz' belief that Mr. Mosely was a licensed attorney. Mr. Schwartz related that on March 13, 1987, in response to an inquiry from the judge, Mr. Mosely offered and began to enter his appearance as counsel of record for plaintiff Michael Roberts. When the Court stated Mr. Mosely could submit an entry of appearance later, Mr. Mosely did not submit the entry he had apparently begun to write. Mr. Schwartz testified that, based on Mr. Mosely's skills and ability; on the March 13, 1987, incident in court; and on conversation he had with Mr. Mosely, he had reason to think Mr. Mosely was an attorney and "no reason to think Mr. Mosely was not an attorney. Mr. Schwartz further testified that he filed the application at a point when the pressure and deadlines of this litigation, in light of the rest of his sole practice, were "starting to take a toll on [him], [his] practice," and other staff. Finally, Mr. Schwartz repeatedly stated that (a) he had never asked to show his bar card(s); and (b) he did not ask other counsel working with him to show their bar cards.

Mr. Schwartz also submitted another brief arguing that Rule 11 sanctions should not be considered with respect to "incidental housekeeping-type of pleadings such as in the instant case, an entry of appearance or some irregularity in signing that constitutes a mere technical defect" unrelated to the facts or legal theory in issue in the case.

Fed. R. Civ. P. 11 provides in relevant part that:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, motion, or

> other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that is is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Mr. Schwartz contends the sanctions permitted by the rule do not apply to "housekeeping" type pleadings such as an entry of appearance. The Court disagrees. The broad language of the rule expressly applies to "[e]very pleading, motion, or other *paper*" (emphasis added). By the rule's terms, there are no exceptions. *But see* Advisory Committee Notes, *supra,* 97 F.R.D. at 201 (the certification requirement relating to discovery papers is governed by Fed. R. Civ. P. 26(g) although discovery motions fall within Fed. R. Civ. P. 11). Moreover, the Court is not persuaded that any judicially-created exception to the rule should encompass entries of appearance of nonlocal counsel. There is no provision allowing an unlicensed person to practice before this Court. Where an attorney is not licensed by this Court, various rules, *see, e.g.,* Local Rule 2, require specific acknowledgement that the attorney is licensed by another court and compliance with certain licensing provisions of this Court. A request for entry pro hac vice is not a paper excepted from compliance with Rule 11.

Here, there is no question that Mr. Schwartz read the application. Indeed, he physically wrote the memorandum application before submitting it to the Court.

Nor is there any contention that Mr. Schwartz submitted the application for an improper purpose. On the contrary, the record reflects Mr. Schwartz' apparent purpose was to retain the assistance of nonlocal "counsel" to pursue the litigation as deemed appropriate and necessary in light of the demands of this litigation and of other business needing Mr. Schwartz' attention. A sanction under Rule 11 may, however, be imposed for failure to comply with the duty to investigate, even if there is no improper purpose in the filing of the pleading or paper. *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1433-34 (7th Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985); *United Food & Commercial Workers Union Local 115 v. Armour and Co.*, 106 F.R.D. 345, 347 (N.D. Cal. 1985). The subjective bad faith standard is inapplicable to Rule 11, *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). Thus, the Court finds it proper to consider whether, to the best of Mr. Schwartz' knowledge, information, and belief formed after reasonable inquiry, the application was well grounded in fact and was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. In particular, the question here is whether Mr. Schwartz conducted reasonable inquiry into the factual basis for the application.

The Court must determine by an objective standard whether the signing attorney's inquiry was reasonable. *See Adduono v. world Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir. 1987); *O'Connell, supra*, 812 F.2d at 395 (objective standard applies under Rule 11). What constitutes a reasonable inquiry at the time the paper was submitted

> may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Advisory Committee Notes, *supra,* 97 F.R.D. at 199. *See Thomas v. Capital Soc. Serv., Inc.,* 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc) (in addition, court may consider feasibility of a prefiling investigation; the complexity of factual and legal issues; extent to which the factual circumstances underlying the claim requires discovery; whether or not the litigant is pro se).

A signing attorney's duty of pre-filing investigation may not be delegated, *Unioil, Inc. v. E. F. Hutton & Co., Inc.,* 809 F.2d 548, 558 (9th Cir. 1986), *cert. denied,* 108 S.Ct. 83, 85 (1987); *see Pravic v. U. S. Industries-Clearing,* 109 F.R.D. 620, 623 (E.D. Mich. 1986) (Rule 11 sanctions imposed where signing attorney relied on memorandum of law prepared by another law firm and attorney did no independent research to discover that cited case law was either overruled or inapplicable); *Coburn Optical Indus., Inc. v. Cilco, Inc.,* 610 F.Supp. 656, 659-60 (M.D. N.C. 1985) (Rule 11 sanctions appropriate and attorney does not satisfy his investigation obligations when he relies on client's assurance about the existence or nonexistence of facts and a reasonable inquiry would indicate otherwise); *see Florida Monument Builders v. All Faiths Memorial Gardens,* 605 F.Supp. 1324, 1326 (S.D. Fla. 1984) (Rule 11 sanctions appropriate where no proper investigation made and allegations were based solely on beliefs and experiences counsel derived from similar litigation in other parts of the country). Moreover, the pre-filing duty to investigate is not satisfied where counsel fails to make a phone call that would provide accurate information, *see United Food & Commercial Workers Union Local 115, supra,* 106 F.R.D. at 548 (Rule 11 sanctions proper where counsel had no reasonable basis in fact for certain allegations and counsel had failed to call to discover relevant information prior to filing the pleading).

Here, it is clear that Mr. Schwartz relied solely on his impressions of Mr. Mosely rather than on an independent investigation of the accuracy of those impressions. Mr. Schwartz did not ask to see Mr. Mosely's bar card and did not call any of the clerks of

the relevant California courts to verify whether in fact Mr. Mosely was a licensed attorney. While Mr. Schwartz may never ask for evidence of licensing when working with other counsel, it is reasonable to seek such evidence when such counsel will be entered as attorney of record in a court proceeding. The fact that Mr. Schwartz has never been asked for his bar card does not render such a request any less reasonable or wise when an entry of appearance in court is contemplated. In fact, this Court asked another attorney in this case for evidence of where he was licensed and he produced several bar cards. While Mr. Schwartz urges he was pressed for time in light of litigation deadlines, the time needed for investigation of Mr. Mosely's status as a licensed attorney was minimal if not negligible. This was not a situation where Mr. Schwartz had to research and analyze complex legal principles or factual situations. Nor was this a situation where the facts were in an adversary's custody or control — thus requiring discovery proceedings to attain or verify the information. Finally, this is not a situation where counsel had to rely on his client for the accuracy of the information. Indeed, one or two phone calls would have provided Mr. Schwartz with the factual information necessary to discovery the application at issue here was not supportable.

Mr. Schwartz urges that the fact he was "mistaken" excuses the erroneous filing and merits the denial of Rule 11 sanctions. *See Baranski v. Serbant,* 106 F.R.D. 247, 249 (N.D. Ill. 1985) (where party concedes a mistake has occurred, mistake is a defense to Rule 11 sanctions). The Court is not persuaded. *Weisman v. Rivlin,* 598 F.Supp. 724, 726 (D.D.C. 1984) (mistake cannot excuse noncompliance with Rule 11); *see Eastway Constr. Corp., supra,* 762 F.2d at 253 (it is no longer enough that an attorney is personally unaware of the groundless nature of an argument or claim). If the Court determined that Mr. Schwartz had engaged in a reasonable inquiry prior to filing the application, and as a result of such inquiry had been misled or otherwise mistaken as to the facts supporting the filed application, a different result might ensue. However, such circumstances do not exist here.

Furthermore, while Mr. Schwartz took prompt action to withdraw Mr. Mosely's appearance as counsel of record, such action does not fully absolve Mr. Schwartz of Rule 11 liability. Rather, such commendable conduct tends to reduce the extent of the sanctions imposed. *Bannon v. Joyce Beverages, Inc.*, 113 F.R.D. 669, 675 (N.D. Ill. 1987).

After careful consideration, the Court finds Mr. Schwartz violated Rule 11 by failing reasonably to inquire into the factual basis for the application prior to the filing of the application.

Once a violation is found, sanctions are mandatory. *O'Connell, supra,* 812 F.2d at 395. Taking into account the circumstances surrounding the filing and withdrawal of Mr. Mosely's entry of appearance; noting no party contends it incurred expense(s) related to the entry of appearance; and based on an effort to deter similar conduct in the future, *see, Brown, supra,* 830 F.2d at 1439 (deterrence is one of the purposes of Rule 11 sanctions), the Court will impose a $1,000.00 sanction for Mr. Schwartz' violation of Rule 11. This monetary sanction shall be paid to the Clerk of the Court for deposit in and use as part of the Court's "Attorney Admission Fee Non-Appropriated Fund," *see* Local Rules 2(R), 2(S), and 2(T). While the amount of this sanction "may be small, . . . even such a humble investment in guaranteeing the proper functioning of our judicial process will reap great dividends." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1180 (D.D.C. 1985).

Mr. Schwartz' request for an award of attorney's fees and expenses will be considered and determined after payment of the sanctions imposed herein.

Dated this 29th day of September, 1988.

/s/ William L. Hungate
United States District Judge

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD E. SCHWARTZ,
Petitioner,

vs.

THE HONORABLE WILLIAM L. HUNGATE,
United States District Judge for the
Eastern District of Missouri,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

On June 11, 1990, this Court decided *Cooter & Gell v. Hartmarx Corporation* and thereby effectively answered the questions presented in this case in a manner adverse to Petitioner Schwartz. Those questions are:

1. Did the United States Court of Appeals for the Eighth Circuit err in showing "substantial deference" to the district court's decision to impose sanctions under Fed.R.Civ.P. 11?

2. Must a district court find both improper purpose and a lack of reasonable inquiry before imposing sanctions?

3. Can a district court impose Rule 11 sanctions after an attorney has withdrawn voluntarily the offending pleading?

LIST OF PARTIES

The parties to this dispute are Petitioner Richard E. Schwartz, an attorney practicing in Missouri, and Respondent, the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri. The parties to the litigation out of which the Rule 11 sanction arose were plaintiff Michael V. Roberts, an unsuccessful candidate for the Democratic nomination for President of the Board of Aldermen of the City of St. Louis, and defendants Jerry B. Wamser, Rita M. Krapf, Walter R. Wrenn, Jr., and David A. Robbins, who were then members of the Board of Election Commissioners of the City of St. Louis. Thomas A. Villa, the successful candidate for the Democratic nomination, was a defendant/intervenor in this underlying litigation.

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No. 89-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD E. SCHWARTZ,
Petitioner,

vs.

THE HONORABLE WILLIAM L. HUNGATE,
United States District Judge for the
Eastern District of Missouri,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri, respectfully requests that this Court deny the Petition for Writ of Certiorari. The Petition seeks review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit affirming the imposition of sanctions under Fed.R.Civ.P. 11. The Eighth Circuit's opinion, which is unreported, appears in the Appendix to the Petition for Writ of Certiorari ("Appendix") at A-2 to A-3.

STATEMENT OF THE CASE

Petitioner Richard E. Schwartz appeared as counsel of record for the plaintiff in the matter of *Michael V. Roberts v. Jerry B. Wamser, et al.*, a case filed in the Eastern District of Missouri in 1987. Roberts was an unsuccessful candidate for the Democratic nomination for President of the Board of Aldermen of the City of St. Louis. Mr. Roberts claimed that Mr. Wamser and his fellow members of the Board of Election Commissioners of the City of St. Louis violated the Voting Rights Act by implementing a punch card voting system in City elections that rejected a disproportionate number of ballots cast by black voters.

After a bench trial, Respondent Hungate concluded that the punch card voting system as implemented in the City of St. Louis did violate § 2 of the Voting Rights Act as amended, 42 U.S.C. § 1973, and that Mr. Roberts had standing to pursue this claim. Judge Hungate concluded, however, that this violation did not result in Roberts' defeat and that Roberts therefore was not entitled to a declaration voiding the election of his primary opponent. Judge Hungate did order the Board of Election Commissioners to take certain steps in the future to ensure the counting of ballots validly cast but rejected by automated tabulating equipment. He also ordered the Board to provide appropriate voter education services to reduce the incidence of invalidated ballots. *Roberts v. Wamser,* 679 F.Supp. 1513 (E.D.Mo. 1987).[1]

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[1] By a two to one vote, a panel of the United States Court of Appeals for the Eighth Circuit reversed. *Roberts v. Wamser,* 883 F.2d 617 (8th Cir. 1989). Noting that the standing of an unsuccessful candidate under the Voting Rights Act was a question of first impression, *id.* at 620 n.11, the Eighth Circuit concluded that Roberts lacked standing under the Voting Rights Act because he was "not an aggrieved voter suing to protect his right to vote." *Id.* at 621.

Schwartz's Petition for Writ of Certiorari arises out of this litigation but is wholly collateral to it. Schwartz entered his appearance on behalf of plaintiff Roberts on March 5, 1987. On April 8, 1987, Schwartz filed on Roberts' behalf a handwritten "application for leave to appear specially." This application stated:

> Plaintiff Michael V. Roberts prays that Errol G. Mosley be granted leave to appear herein specially together with Richard E. Schwartz on behalf of said plaintiff. In support of this application your movant-plaintiff states as follows:
>
> 1. Errol G. Mosley graduated from Howard University in D.C. and thereafter served as law clerk to the Honorable Consuelo B. Marshall, United States District Judge for the Central District of California.
>
> 2. Errol G. Mosley is a member of the State Bar of California and is admitted to practice before the Supreme Court of California.
>
> 3. Errol G. Mosley also is admitted to practice before the U.S. Court of Appeals, Ninth Circuit, and the U.S. District Court for the Central District of California.
>
> 4. Errol G. Mosley is an associate with the firm O'Melveny and Meyers, Los Angeles, and is presently on sabbatical leave from that firm.
>
> WHEREFORE plaintiff Roberts prays that Errol G. Mosley be admitted specially [several words illegible].
>
> /s/ Richard E. Schwartz
> Attorney for Plaintiff Roberts

(Appendix A-5 to A-6).

On April 8, 1987, Judge Hungate granted the application and Mr. Mosely was permitted to appear pro hac vice.[2] Mr. Mosely subsequently attended a chambers conference that day concerning the *Roberts* case. On April 15, 1987, a "memorandum for clerk" signed only by Schwartz was filed. That memorandum stated:

> Comes now Errol G. Mosely and withdraws his appearance herein as co-counsel for plaintiff Michael V. Roberts. Richard E. Schwartz will continue as counsel on behalf of plaintiff Michael V. Roberts.

(Appendix A-6 to A-7). Leave for Mr. Mosely's withdrawal was granted on April 20, 1987.

There was no dispute below that Mr. Mosely was not a member of the State Bar of California, was not admitted to practice before the Supreme Court of California, was not admitted to practice before the United States Court of Appeals for the Ninth Circuit, and was not admitted to practice before the United States District Court for the Central District of California. Indeed, Mr. Mosely was apparently not licensed to practice in any jurisdiction.

On May 21, 1987, Judge Hungate entered an order directing Schwartz to show cause why sanctions under Fed.R.Civ.P. 11 should not be imposed against him. In response Schwartz filed his own affidavit and that of Mr. Mosely. In his affidavit, Schwartz said Mosley was introduced to him as a graduate of Howard University Law School and Schwartz "formed the impression at that time that Mr. Mosely was in fact a practicing attorney." (Appendix A-8). According to Schwartz, this "impression" was fortified by the quality of certain research and drafting Mosely did for Schwartz. From his conversations with

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[2] More than one spelling of Mr. Mosely's name appears in the record below. The correct spelling is apparently "Mosely."

Mosely, Schwartz "acquired the impression" that Mosely was a member of the California Bar and admitted to practice in the Central District of California and before the Ninth Circuit. *Id.* In his affidavit, Schwartz stated that he prepared the handwritten application and "verbally checked it with Mr. Mosely who voiced no dissent." *Id.* Mr. Mosely's affidavit confirmed that he was a graduate of the Howard University School of Law and related his employment history. Pointedly, it failed to note his admission to any bar. Mr. Schwartz's affidavit stated Mr. Mosely had taken, but failed to pass, the California Bar exam.

Judge Hungate denied without prejudice Schwartz's request to withdraw as counsel of record, and scheduled a hearing on the show cause order. The hearing was held on February 19, 1988. Schwartz reiterated his position that Mosely's actions gave Schwartz reason to believe that Mosely was an attorney.

Judge Hungate found that Schwartz did not submit the Mosely application for an improper purpose. The issue was "whether Mr. Schwartz conducted reasonable inquiry into the factual basis for the application." (Appendix A-13).

> Here, it is clear that Mr. Schwartz relied solely on his impressions of Mr. Mosely rather than on an independent investigation of the accuracy of those impressions. Mr. Schwartz did not ask to see Mr. Mosely's bar card and did not call any of the clerks of the relevant California courts to verify whether in fact Mr. Mosely was a licensed attorney. While Mr. Schwartz may never ask for evidence of licensing when working with other counsel, it is reasonable to seek such evidence when such counsel will be entered as attorney of record in a court proceeding. . . . While Mr. Schwartz urges he was pressed for time in light of litigation deadlines, the time needed for investigation of Mr. Mosely's status as a licensed attorney was minimal if not negligible. This was not a situation where Mr. Schwartz had to research and analyze complex legal principles or factual

> situations. Nor was this a situation where the facts were in an adversary's custody or control — thus requiring discovery proceedings to attain or verify the information. Finally, this is not a situation where counsel had to rely on his client for the accuracy of the information. Indeed, one or two phone calls would have provided Mr. Schwartz with the factual information necessary to discovery [*sic*] the application at issue here was not supportable.

(Appendix A-14 to A-15).

Judge Hungate found this lack of inquiry a violation of Fed.R.Civ.P. 11. He noted that "[o]nce a violation is found, sanctions are mandatory." (Appendix A-16, citing *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987)). "Taking into account the circumstances surrounding the filing and withdrawal of Mr. Mosely's entry of appearance [and] noting no party contends it incurred expense(s) related to the entry of appearance," Judge Hungate imposed a monetary sanction of $1,000 "to deter similar conduct in the future." (Appendix A-16).

A panel of the United States Court of Appeals for the Eighth Circuit unanimously affirmed the imposition of sanctions in a *per curiam* opinion. The court of appeals noted that a determination by the district court that a Rule 11 violation has occurred " 'deserves substantial deference from a reviewing court.' " (Appendix A-3, quoting *O'Connell, supra,* at 395). The appellate court saw "no error of fact or law in the District Court's determination" and found no abuse of discretion in fashioning the sanction. (Appendix A-3). Schwartz petitioned for rehearing en banc, arguing that the standard of review applied by the appellate panel was inconsistent with the *de novo* standard of review applied by the Eighth Circuit in other Rule 11 cases. Schwartz's petition for rehearing was denied on October 12, 1989.

REASONS FOR DENYING THE WRIT

On June 11, 1990, the Court handed down its decision in *Cooter & Gell v. Hartmarx Corporation,* 58 U.S.L.W. 4763 (U.S. June 11, 1990). *Hartmarx* directly or indirectly addresses all the questions presented by Schwartz's Petition and rejects the positions urged by Schwartz. Therefore, this case does not warrant review by the Court.

I. *Hartmarx* Held That All Components Of A Rule 11 Determination Are Subject To An "Abuse of Discretion" Standard Of Review On Appeal And Petitioner, At A Minimum, Was Afforded That Level Of Review

Schwartz argues that the Eighth Circuit improperly applied a "substantial deference" standard of review to Judge Hungate's finding that Schwartz's conduct violated Rule 11. He maintains that *de novo* review is the proper standard and points to decisions in the Seventh and Ninth Circuits which apply this standard to certain aspects of the Rule 11 determination. Petition for Writ of Certiorari ("Petition") at 9.

It is entirely possible that the Eighth Circuit did apply a *de novo* standard of review. In addition to quoting the observation in *O'Connell v. Champion Int'l Corp.,* 812 F.2d 393, 395 (8th Cir. 1987), that a district court's finding of a Rule 11 violation " 'deserves substantial deference from a reviewing court,' " the Eighth Circuit panel concluded:

> Having carefully reviewed the record and Schwartz's arguments on appeal, we see no error of fact or law in the District Court's determination that a violation of Rule 11 occurred. Further, we cannot say that the District Court abused its discretion in fashioning the sanction.

(Appendix A-3).

As Schwartz points out, the Eighth Circuit in the past has subscribed to a three-pronged approach to review of Rule 11

sanctions: review of factual determinations under a "clearly erroneous" standard, *de novo* review of legal conclusions, and review of the sanction imposed for "abuse of discretion." *E.g., Kurkowski v. Volcker,* 819 F.2d 201, 203 n.8 (8th Cir. 1987). It is certainly not evident that the Eighth Circuit deviated from that approach here.[3] Even if the Eighth Circuit panel ignored its own Circuit precedents, *intracircuit* conflicts are not matters for review in this Court. *See Davis v. United States,* 417 U.S. 333, 340 (1974). Moreover, the thrust of Schwartz's argument is that the appellate court should have conducted a *de novo* review of the facts. Petition at 10. Even before *Hartmarx,* the federal courts of appeals uniformly rejected such exacting scrutiny of a district court's factual findings in Rule 11 cases. *See Cooter & Gell v. Hartmarx Corp.,* 58 U.S.L.W. 4763, 4767 (U.S. June 11, 1990).

Most importantly, this Court in *Hartmarx* resolved the precise *intercircuit* conflict on the appropriate standard of review urged by Schwartz in support of his Petition.[4] The Court held that all aspects of the district court's Rule 11 determination should be reviewed under the highly deferential "abuse of discretion" standard.

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[3] For other Eighth Circuit cases implicitly or explicitly applying the tripartite standard of review, see *EEOC v. Milavetz & Associates, P.A.,* 863 F.2d 613, 614 (8th Cir. 1988); *American Inmate Paralegal Assoc. v. Cline,* 859 F.2d 59, 61-62 (8th Cir.), *cert. denied,* 109 S.Ct. 565 (1988); *Hartman v. Hallmark Cards, Inc.,* 833 F.2d 117, 124 (8th Cir. 1987).

[4] Like Schwartz, the petitioner in *Cooter & Gell v. Hartmarx Corp.,* 58 U.S.L.W. 4763, 4767 (U.S. June 11, 1990), urged the Court to adopt the *de novo* standard of review articulated by the Ninth Circuit in *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 828 (9th Cir. 1986). The Court noted that the Ninth Circuit was in conflict with those Circuits that "apply a deferential standard to all issues raised by a Rule 11 violation." 58 U.S.L.W. at 4767.

> Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.
>
> Although district courts' identification of what conduct violates Rule 11 may vary . . . some variation in the application of a standard based on reasonableness is inevitable.

Id. at 4768.

Therefore, even if the Eighth Circuit applied a "substantial deference" standard of review, the imposition of sanctions on Schwartz was afforded, at a minimum, the appropriate degree of scrutiny.[5] *Hartmarx* settled the standard of review question

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[5] As this Court has acknowledged in a variety of contexts, a "substantial deference" standard of review is merely a different verbal formulation of the "abuse of discretion" standard. In describing the "abuse of discretion" standard of review of a district court's decision to certify a judgment as final for purposes of appeal under Fed.R.Civ.P. 54(b), the Court stated that "the discretionary judgment of the district court should be given substantial deference." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980).

The disposition of a forum non conveniens motion is also subject to "abuse of discretion" appellate review. In that context the Court observed:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

and there is no cause for the Court to revisit the issue in this case.

II. The Language Of Rule 11 Refutes, And The Federal Courts Of Appeals Uniformly Reject, Petitioner's Contention That Rule 11 Sanctions Can Be Imposed Only When There Is Both Improper Purpose And Lack Of Reasonable Inquiry

Schwartz argues that Rule 11 sanctions can only be imposed when the erroneous pleading or filing is interposed for an improper purpose. In support of this proposition, Schwartz cites various cases that allegedly demonstrate that Rule 11 sanctions cannot be imposed for lack of reasonable inquiry in the absence of bad faith. Respondent submits there is in fact no support for Schwartz's contention in the wording of Rule 11 or in the case law, and certainly nothing to commend the issue for the attention of this Court.

Schwartz is correct that the Federal Rules of Civil Procedure, including Rule 11, are to be given their plain meaning. *Pavelic & Leflore v. Marvel Entertainment Group,* 110 S.Ct. 456, 458 (1989). But the plain meaning of Rule 11 is directly contrary to the interpretation Schwartz attempts to give it. By the literal terms of Rule 11, an attorney who signs a paper or pleading makes three independent certifications:

(1) that he "has read the pleading, motion or other paper;"

(2) that to the best of his "knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law *and*"

(3) "that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

If there is no Rule 11 violation unless there is an improper purpose, the first and second certifications become superfluous. The drafters of Rule 11 obviously used the conjunctive "and" to communicate that subjective or objective "good faith" is insufficient to satisfy the "reasonable inquiry" obligation imposed by Rule 11.

The purpose of the 1983 amendments to Rule 11 was, in fact, to impose a more stringent standard than the original good-faith formula that courts read into the pre-1983 Rule 11. Advisory Committee Note to 1983 Amendments to Fed.R.Civ.P. 11, *reprinted in* 97 F.R.D. 165, 198-199 (1983). A leading commentator on Rule 11 has argued that a bad-faith requirement is inconsistent with Rule 11's text and purpose. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look,* 104 F.R.D. 181, 191 (1985). Judge Schwarzer refers to the reasonable inquiry into the facts and law required by Rule 11 as two of the three prongs of Rule 11.

> The first two prongs of the rule . . . are directed at the merits: in substance they are aimed at frivolous papers. The third prong is directed at papers which, though not necessarily frivolous, are found to be interposed for an improper purpose.

Id. at 195. Obviously, it does violence to the logic of Rule 11 to engraft the "improper purpose" requirement onto the obligation to make reasonable inquiry into the facts and law.[6]

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[6] Judge Schwarzer's article is cited with approval by this Court in *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4763, 4765 (U.S. June 11, 1990). Interestingly, when Judge Schwarzer revisits Rule 11 in an article cited by Schwartz in his Petition at 10, Judge Schwarzer "does not address the prohibition against papers filed for an improper purpose." He notes that "[f]ew courts have imposed sanctions on this ground." Schwarzer, *Rule 11 Revisited,* 101 Harv.L.Rev. 1013, 1015 n.7 (1988). This observation contradicts Schwartz's suggestion that there is something anomalous about the imposition of Rule 11 sanctions in the absence of "improper purpose." Petition at 14.

Nor is there any confusion on this issue in the lower courts. It appears that every United States Court of Appeals that has addressed the issue has found the failure to conduct a reasonable inquiry under Rule 11 subject to sanctions without regard to the presence of an improper purpose.[7] Given this unanimity in the appellate courts, it is pointless to discuss the district court authority cited by Schwartz. Also, given this unanimity, it is unsurprising that the appellate case relied upon by Schwartz is inapposite. In *In re Itel Securities Litigation,* 791 F.2d 672 (9th Cir. 1986), *cert. denied,* 479 U.S. 1033 (1987), the Ninth Circuit observed that a finding of bad faith is a "prerequisite to assessment of attorneys' fees *under the court's inherent power.*" *Id.* at 674 (emphasis added). The Ninth Circuit was speaking of a district court's "inherent power to award attorneys' fees as a means of protecting the integrity of the judicial process." *Id. In re Itel Securities Litigation* does not stand for the proposition that bad faith is a prerequisite to the imposition of sanctions under Rule 11.

Finally, *Hartmarx* itself belies Schwartz's argument. Sanctions were imposed in that case because the plaintiff's "prefiling

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[7] These cases identify "improper purpose" and a lack of "reasonable inquiry" as distinct grounds for Rule 11 sanctions. *See Monument Builders v. American Cemetery Ass'n,* 891 F.2d 1473, 1484-85 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 2168 (1990); *Thomas v. Evans,* 880 F.2d 1235, 1239-44 (11th Cir. 1989); *Muthig v. Brant Point Nantucket, Inc.,* 838 F.2d 600, 604-05 (1st Cir. 1988) (construing the "reasonable inquiry" requirement without regard to improper purpose); *Brown v. Federation of State Medical Bds.,* 830 F.2d 1429, 1435-36 (7th Cir. 1987); *Greenberg v. Sala,* 822 F.2d 882, 885 (9th Cir. 1987); *Robinson v. National Cash Register Co.,* 808 F.2d 1119, 1130 (5th Cir. 1987) ("violation of only one of the two clauses in rule 11 is sufficient for a district court to impose sanctions"); *Westmoreland v. CBS, Inc.,* 770 F.2d 1168, 1177 (D.C. Cir. 1985); *Eastway Const. Corp. v. New York,* 762 F.2d 243, 253-54 (2d Cir. 1985). *See also Century Products, Inc. v. Sutter,* 837 F.2d 247, 253 (6th Cir. 1988) (Nelson, J., concurring) ("Rule 11 does not prohibit an attorney from signing a motion that has a proper purpose if the attorney reasonably believes the motion 'is warranted by existing law. . . .' ").

inquiry was grossly inadequate." 58 U.S.L.W. at 4764. There was no suggestion that the complaint was filed for an improper purpose. Indeed, the district court in *Hartmarx* relied on the articulation of the Rule 11 standard set forth in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir. 1985), which, as noted in footnote 7 *supra*, identified lack of reasonable inquiry as a distinct ground for sanctions, regardless of the good faith of those who file the pleading. *See Danik, Inc. v. Hartmarx Corp.*, 120 F.R.D. 439, 440 (D.D.C. 1988), *aff'd*, 875 F.2d 890, 895-96 (D.C. Cir. 1989), *aff'd in relevant part*, 58 U.S.L.W. 4763 (U.S. June 11, 1990). In sum, there is no confusion about the independence of the "reasonable inquiry" and "improper purpose" clauses of Rule 11 either in the wording of Rule 11 or in the lower courts.

III. *Hartmarx* Establishes That The Voluntary Withdrawal Of The Offending Pleading Does Not Divest The District Court Of Jurisdiction To Impose Rule 11 Sanctions

Finally, Schwartz argues this case "presents an issue nearly identical to one of the questions presented in *Cooter & Gell, supra*, namely whether the district courts have jurisdiction to impose Rule 11 sanctions if the issue is raised *after* the paper in question has been voluntarily withdrawn by the signing attorney." Petition at 15 (emphasis in original). Petitioner argues that Judge Hungate did not have the authority to impose Rule 11 sanctions after Mr. Mosely's appearance had been voluntarily withdrawn.

In *Cooter & Gell v. Hartmarx*, this Court resolved the jurisdictional issue adversely to Schwartz. It found that the " 'violation of Rule 11 is complete when the paper is filed.' " 58 U.S.L.W. at 4766 (quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987)). The Court concluded that a federal court may consider collateral issues such as Rule 11 sanctions after an action is no longer pending. It ex-

pressly rejected the Second Circuit's *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28, 31 (2d Cir. 1987), the only case Schwartz musters in support of his position. 58 U.S.L.W. at 4766. If voluntary dismissal of the entire action does not divest the trial court of its jurisdiction to impose Rule 11 sanctions, mere withdrawal of the offending pleading certainly cannot.

CONCLUSION

The true gravamen of Schwartz's Petition is that under all the facts and circumstances of this case, it was unfair to impose the relatively nominal Rule 11 sanction involved here. But the unique facts and circumstances inherent in each Rule 11 determination are precisely why this Court has emphasized the deference to be afforded district courts. "The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Hartmarx,* 58 U.S.L.W. at 4768. The sanction in this case is reasonably tailored to the violation, and provides an incentive to members of the bar to " 'stop, think and investigate more carefully before serving and filing papers' "[1] such as the motion Schwartz filed below. Any issue of general interest raised by Schwartz's Petition has been resolved by *Hartmarx,* and what remains is a question of the appropriateness of the sanction under the peculiar circumstances of this case—a question clearly inappropriate for review by this Court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[1] *Hartmarx,* 58 U.S.L.W. at 4767 (quoting Letter of Judge Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, *reprinted in* 97 F.R.D. 190, 192 (1983)).